No. 78-86

In the Supreme Court of the United States

OCTOBER TERM, 1978

BLAIR LEE, III, ETC., ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
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Petitioners seek review of an order of the court of appeals affirming a preliminary injunction. Petitioners were the prevailing parties in both lower courts. In its present posture, this case does not warrant consideration by this Court.

The State brought this suit against the Department of Health, Education, and Welfare and certain of its officers, seeking to enjoin the Department from pursuing administrative enforcement proceedings against the State's system of higher education under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. (and Supp. V) 2000d *et seq*. Petitioners alleged that in effectuating its statutory responsibilities, the Department was

acting in an arbitrary and illegal manner.[1] The district court issued a preliminary injunction against the Department (Pet. App. 44a) and the Department appealed.

The court of appeals, sitting *en banc*, initially reversed the district court's decision in the Baltimore case and vacated and remanded the decision in this case (Pet. App. 56a-90a). The court divided 4-3 in both cases; it noted that Judge J. Braxton Craven, Jr., had died before the filing of the opinions, but that prior to his death he had concurred in the judgment and had read and approved the majority opinion (Pet. App. 58a). Following motions for reconsideration filed by petitioners, the court of appeals withdrew its prior opinions and affirmed the district court's decision by an equally divided court. The court stated that upon reconsideration it concluded that it had improperly counted Judge Craven's vote because, although he had read and approved the majority opinion, he had not had the opportunity to read and consider the dissenting opinions (Pet. App. 93a). The court remanded the cases to the district court for trial, advising the district court "to try them and enter a final order as expeditiously as possible" (Pet. App. 94a).

The Department has not sought review by this Court of the judgment of the court of appeals but plans to request that the district court proceed with any necessary hearings in order to obtain a final decision on the merits of the dispute, which would then be subject to review by the court of appeals. Review of the orders entered by the courts below at

[1]A companion suit was filed against the Department by the Mayor and other officials of the City of Baltimore, alleging similar improprieties by the Department in its attempt to enforce Title VI with respect to the City's public school system. The cases were consolidated in the district court and on appeal.

the present stage of the case is unwarranted.[2] The court of appeals' affirmance by an evenly-divided court is, of course, of no precedential significance, and petitioners were the prevailing parties below. This Court has repeatedly refused to entertain appeals prosecuted by the prevailing parties. See *Perez* v. *Ledesma*, 401 U.S. 82, 87 n. 3; *Gunn* v. *University Committee To End the War in Viet Nam*, 399 U.S. 383, 390 n. 5; *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206. The same principles apply to the Court's certiorari jurisdiction. See Stern & Gressman, *Supreme Court Practice*, Section 2.4 (4th ed. 1969).[3]

[2]While we do not believe that an extensive review of the facts of these cases is necessary here, we note that we do not adopt the statement of facts contained in the petition. We believe that the initial opinion of the court of appeals fairly stated the facts of these two cases [redacted] (see Pet. App. 56a-75a).

[3]Petitioners cite *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, and *United States* v. *Lovett*, 328 U.S. 303, apparently in an effort to suggest that prevailing parties have successfully sought review in this Court in the past. In *Lovett*, however, judgments were entered in favor of the respondent federal employees and against the United States in the lower court. Although the Solicitor General, representing the United States, supported the respondents on the merits, there was no question of the right of the United States to petition for certiorari, since the United States had lost the case in the lower court. In *Hardison*, the Court noted that because the union was technically a prevailing party in the lower court, "[i]t may thus appear anomalous to have granted the union's petition for certiorari as well as that of TWA" (432 U.S. at 70-71 n. 5). But the judgment against TWA, according to the union, "seriously involve[d] union interests" by imposing apparent legal obligations on the union in the enforcement of its collective bargaining agreement (*ibid.*). In any event, the Court noted that since the judgment against TWA was reversed at TWA's own behest, "we need not pursue further the union's status in this Court" (*ibid.*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

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